



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 10, 1994

Ms. Nancy S. Footer
Associate University Counsel
University of Houston System
1600 Smith, Suite 3400
Houston, Texas 77002

OR94-117

Dear Ms. Footer:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).¹ Your request was assigned ID# 22945.

The University of Houston (the "university") received open records requests for, *inter alia*, two types of information:

- 1) a list of every student currently registered at the University of Houston-Downtown for the fall 1993 semester and their Student Identification Number; and
- 2) any and all evaluations of Administrators made by either students, faculty, or staff at the University of Houston-Downtown.

You contend that the requested list of students should be withheld in its entirety because "[t]his document is an education record containing personally identifiable student information which is protected by Art. 6252-17a §§ 3(a)(1) and (14) and 20 U.S.C. [§] 1232g." Under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, the university is prohibited from releasing "personally identifiable information" (other than directory information) contained in a student's education records to anyone but certain federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). When a student has attained the age of eighteen years or is attending an institution of postsecondary

¹The Seventy-third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

education, the student holds the rights accorded by Congress to inspect these records. *Id.* § 1232g(d).

This office agrees that the university must withhold students' social security numbers, which the university uses as student identification numbers, pursuant to FERPA. See 34 C.F.R. § 99.3 (defining "personally identifiable information" as including student identification numbers). However, the remaining information contained on the class roster you have submitted to this office, e.g., students' names, majors, status, dates of enrollment, etc., appears to consist solely of "directory information" that is open to the public under the Open Records Act.² See 20 U.S.C. § 1232g(a)(5)(A) (defining "directory information"); Open Records Decision No. 242 (1980). Consequently, assuming that the student list you submitted to this office is representative of the remaining student lists, the university may withhold only the students' social security numbers; the remaining information must be released.

You contend that the evaluations of administrators come under the protection of former sections 3(a)(2) and 3(a)(11) of article 6252-17a, V.T.C.S. (now found at sections 552.102 and 552.111, respectively, of the Government Code). You also inform this office that "[s]ome faculty who engaged in [the] evaluation process were promised confidentiality and many were told that even if the information was provided to the supervisor, it would not be provided in the handwritten format." We note, however, that information is not confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987). *But cf.* Open Records Decision No. 284 (1981) (letters of recommendation submitted pursuant to express contracts of confidentiality prior to 1973, when the Open Records Act was enacted, are enforceable). Consequently, unless the requested evaluations fall within one of the act's exceptions to disclosure, they must be released, notwithstanding any agreement between the university and faculty evaluators specifying otherwise.

We now discuss the exceptions to disclosure that you have raised with regard to the evaluations. Section 552.102 is designed to protect public employees' personal privacy. The scope of section 552.102 protection, however, is very narrow. See Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102 protection is the same as that for information protected by common-law privacy under section 552.101: to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas*

²We note, however, that to the extent that similar lists also contain students' grades, those grades must also be withheld. See Open Records Decision No. 120 (1976).

Newspapers, Inc., 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). The information contained in the evaluation you have submitted to this office for review pertains solely to the job performance of a public servant, and as such cannot be deemed to be outside the realm of public interest. Section 552.102 was not intended to protect the type of information contained in this evaluation. See Open Records Decision No. 444 (1986) (public has a legitimate interest in knowing the reasons for the dismissal, demotion, promotion, or resignation of public employees). Consequently, the evaluation you have submitted to this office may not be withheld pursuant to section 552.102.³

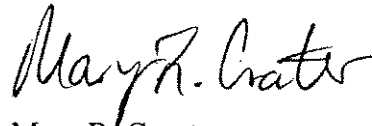
Section 552.111 of the Government Code excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993) at 5. The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters [Emphasis in original.]

The personnel evaluation you have submitted to this office does not reflect the "policymaking" function of the university, but rather pertains solely to the routine evaluation of one of the university's administrators. Such evaluations are not excepted from public disclosure by section 552.111.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Open Government Section

³We have reviewed only the evaluation you have submitted to this office. The university must release all of the remaining evaluations that are the subject of the request. Please note, however, that the improper release of information deemed confidential by law, e.g., the common-law right of privacy, is a criminal offense. Gov't Code § 552.352. We will review other requested evaluations that you believe contain "highly intimate or embarrassing facts" of a truly personal nature if you submit those evaluations to this office within seven days of the date of this letter.

MRC/RWP/rho

Ref.: ID# 22945
ID# 24395

Enclosures: Submitted documents

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(w/o enclosures)